KETUA PENGARAH HASIL DALAM NEGERI *a*

v.

KIM THYE & CO.

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
PEH SWEE CHIN SCJ
EDGAR JOSEPH JR SCJ
[CIVIL APPEAL NO. 01-38-91]
1 OCTOBER 1992 *b*

REVENUE LAW: *Assessment - Whether "penalty" imposed by Director-General of Inland Revenue under s. 113(2) of Income Tax Act 1967 amounted to an assessment within the meaning of the word and was therefore appealable to the Special Commissioners of Income Tax under s. 99(1) - Whether Director-General of Inland Revenue had unfettered discretion to impose penalty under s. 113(2).* *c*

WORDS AND PHRASES: *Definition of "assessment" and "penalty" under s. 113(2) of Income Tax Act 1967.* *d*

The respondents/taxpayers' use of the heading "Purchase of Logs" in their income tax returns caused the Director General of Inland Revenue ("the Revenue") to miss charging the taxpayers with the timber profits tax. On discovery of the mistake the Revenue assessed and charged the timber profits tax which was duly paid by the taxpayers without protest and appeal.

However, the 100 percent penalty imposed on the undercharged tax of RM62,173.90 by the Revenue under s. 113(2) of the Income Tax Act 1967 ("the Act") for incorrect returns or information was appealed to the Special Commissioners of Income Tax. The taxpayers had also written a letter to the Revenue dated 13 August 1984 to which the Revenue responded by seeking particulars and information in order to expedite the respondents' outstanding appeal. After a delay of two years and eight months, the Revenue rejected the appeal to the Special Commissioners themselves and demanded the penalty. *e*

Being aggrieved, the taxpayers moved the Muar High Court for an order of *certiorari* to quash the imposed penalty and an order for *mandamus* to direct the Revenue to refer the appeal to the Special Commissioners. Tallala J upheld the decision of Wan Hamzah J (as he then was) in *Government of Malaysia v. Preston Corpn. (M) Sdn. Bhd.* [1982] CLJ (Rep) 453 who had held that a penalty imposed by the Director General of Inland Revenue under s. 113(2) of the Act 1967, was an assessment and therefore appealable to the Special Commissioners under s. 99(1). *f* *g*

The merits or demerits of the penalty was not considered as the question that was canvassed by the Revenue in the Supreme Court was cast in a pure question of law as to whether the said penalty imposed by s. 113(2) of the Act was appealable to the Special Commissioners under s. 99 of the Act. The question then arose as to whether the said imposition of penalty was an assessment within the meaning of s. 99 of the Act which *inter alia* read: *h*

Section 99:

(1) A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment ...

i

The appellant argued that as there were no express provisions for appeal against the imposition of such a penalty, unlike other commonwealth countries on whose income tax laws Malaysia had modelled its income tax legislation, the taxpayers had no right of appeal under s. 99 of the Act. Further, it argued that it had unfettered discretion under s. 113 of the Act and that it need not be satisfied that the incorrect return or information was given in good faith.

The appellants also claimed that the word "assessment" in respect of which an appeal lay under s. 99 in Chapter (2) must be in the nature of assessment of tax and not of penalty as indicated by those sections in Chapter (1) of the Act.

Held:

[1] As the definition of the word "assessment" in s. 2 of the Act was not helpful as it merely defined it as "any assessment or additional assessment," applying the primary rule of construction, the word was construed by resorting to the *Shorter Oxford Dictionary* 3rd Edn., which defined the word "to assess" as follows:

(1) to fix the amount of (taxation, fine, etc.) to be paid by a person or community.

(2) to impose a fine or tax upon, to tax, fine.

Such construction of the word supported the taxpayers' contention.

[2] The penalty imposed under s. 113(2) was construed to be an assessment referred to in s. 99 of the Act and therefore appealable to the Special Commissioners of Income Tax.

[3] Although the Director-General had a discretion under s. 113(2) to impose a penalty, that discretion cannot be exercised arbitrarily but only after "... due consideration of all relevant facts and circumstances...". There can be no unfettered discretion unless it was expressly enacted in the Act that such penalty under s. 113(2) of the Act is not appealable to the Special Commissioners of Income Tax.

[4] If there was an ambiguity in the definition of the word "assessment" in the Act, it ought to be resolved in favour of the taxpayer as the taxing statute is penal in nature.

[Appeal dismissed with costs. Decision and orders made by the High Court at Muar affirmed.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG HASIL: *Taksiran - Sama ada "penalti" yang dikenakan oleh Ketua Pengarah Hasil Dalam Negeri di bawah s. 113(2) Akta Cukai Pendapatan 1967 bersifat suatu taksiran dalam lingkungan maksud perkataan tersebut dan oleh yang demikian boleh dirayu kepada Pesuruhjaya Khas Cukai Pendapatan di bawah s. 99(1) - Sama ada Ketua Pengarah Hasil Dalam Negeri mempunyai budibicara yang tidak terhad untuk mengenakan penalti di bawah s. 113(2).*

PERKATAAN & ISTILAH: *Makna taksiran (assessment) dan "penalti" di bawah s. 113(2) Akta Cukai Pendapatan 1967.*

Penggunaan tajuk "pembelian Kayu Balak" oleh responden/pembayar cukai dalam borang penyata cukai pendapatan mereka telah membuatkan Ketua Pengarah Hasil Dalam Negeri ("Hasil") tidak mengenakan cukai hasil keuntungan balak. Apabila kesilapan tersebut disedari, Hasil telah menaksirkan dan mengenakan cukai keuntungan balak yang mana telah dibayar dengan sepenuhnya oleh pembayar cukai tanpa bantahan dan rayuan.

Walau bagaimanapun, penalti 100% yang dikenakan oleh hasil di bawah s. 113(2) Akta Cukai Pendapatan 1967 ("Akta tersebut") di atas sebab penyata atau maklumat yang tidak betul telah dirayukan kepada Pesuruhjaya Khas Cukai Pendapatan. Pembayar cukai telah menulis surat kepada Hasil bertarikh 13 Ogos 1984 kepada mana Hasil telah menjawab dengan meminta butir-butir dan maklumat supaya dapat menyegerakan rayuan responden yang agak lama belum diselesai. Selepas kelewatan selama 2 tahun dan 8 bulan, Hasil sendiri telah menolak rayuan kepada Pesuruhjaya Khas tersebut dan menuntut penalti tersebut.

Pembayar-pembayar terkilan dengan tindakan Hasil lalu mengemukakan permohonan untuk perintah *certiorari* bagi membatalkan penalti yang dikenakan dan suatu perintah *mandamus* untuk mengarahkan Hasil supaya merujukkan rayuan berkenaan kepada Pesuruhjaya Khas daripada Mahkamah Tinggi Muar. Hakim Tallala telah mengekalkan keputusan Hakim Wan Hamzah (sebagaimana beliau pada waktu itu) dalam *Government of Malaysia v. Preston Corpn. (M) Sdn. Bhd.* [1982] CLJ (Rep) 453 yang telah memutuskan bahawa suatu penalti yang dikenakan oleh Ketua Pengarah Hasil Dalam Negeri di bawah s. 113(2) Akta 1967 adalah merupakan suatu pentaksiran dan oleh yang demikian boleh dirayu kepada Pesuruhjaya Khas di bawah s. 99(1).

Merit atau demerit penalti tidak dipertimbangkan memandangkan rayuan yang dikemukakan oleh Hasil dalam Mahkamah Agung berbentuk persoalan undang-undang tulen sama ada penalti yang dikenakan oleh s. 113(2) Akta tersebut boleh dirayu kepada Pesuruhjaya Khas di bawah s. 99 Akta tersebut. Kemudian timbul persoalan sama ada penalti yang dikenakan itu adalah merupakan suatu pentaksiran dalam lingkungan maksud s. 99 Akta tersebut yang mana antara lain berbunyi:

> Seksyen 99:
>
> (1) Seseorang yang terkilan oleh suatu pentaksiran yang dibuat terhadapnya boleh merayu kepada Pesuruhjaya Khas ke atas taksiran tersebut.

Perayu menghujahkan bahawa memandangkan tiada peruntukan nyata bagi rayuan terhadap pengenaan penalti yang sedemikian, tidak seperti lain-lain negara Komanwel yang mana undang-undang cukai pendapatannya dicontohi oleh Malaysia dalam perundangan cukai pendapatan, pembayar-pembayar cukai tidak mempunyai hak rayuan di bawah s. 99 Akta tersebut. Selanjutnya, ia menghujahkan bahawa ia mempunyai budibicara yang tidak terhad di bawah s. 113 Akta tersebut dan tidak perlu bagi ia berpuashati bahawa penyata atau maklumat yang tidak benar itu diberikan dengan suci hati.

Perayu juga menyatakan bahawa perkataan "pentaksiran (assessment)" dibawah mana terdapat suatu rayuan di bawah s. 99 dalam bab (2) mestilah bersifat taksiran cukai dan bukannya penalti sebagaimana yang ditunjukkan oleh seksyen-seksyen dalam bab(1) Akta tersebut.

Diputuskan:

[1] Memandangkan pentakrifan perkataan "pentaksiran (assessment)" dalam s. 2 Akta tersebut tidak dapat membantu kerana ianya hanya mentakrifkannya sebagai "sebarang taksiran atau taksiran tambahan", dengan menggunakan kaedah pentafsiran asas perkataan tersebut telah ditafsirkan dengan merujuk kepada Edisi Ketiga **Shorter Oxford Dictionary** yang mana mentakrifkan perkataan "untuk menaksirkan" seperti berikut:

(i) menetapkan jumlah (pencukaian, denda dan lain-lain) yang patut dibayar oleh seseorang atau golongan

(ii) mengenakan denda atau atas cukai, mengenakan cukai, denda.

Pentafsiran sedemikian menyokong penghujahan pembayar-pembayar cukai.

[2] Penalti yang dikenakan di bawah s. 113(2) ditafsirkan sebagai suatu taksiran yang diperujukkan dalam s. 99 Akta tersebut dan oleh yang demikian rayuan boleh dikemukakan kepada Pesuruhjaya Khas Cukai Pendapatan.

[3] Walaupun Hasil mempunyai budibicara di bawah s. 113(2) untuk mengenakan penalti, budibicara tersebut hanya boleh diamalkan selepas menimbangkan dengan wajar akan segala fakta dan keadaan yang relevan. Tidak boleh terdapat budibicara yang tidak terhad melainkan ianya diperbuat dengan nyata dalam Akta tersebut bahawa penalti sedemikian di bawah s. 113(2) Akta tersebut tidak boleh dirayu kepada Pesuruhjaya Khas Cukai Pendapatan.

[4] Sekiranya terdapat keraguan dalam pentakrifan perkataan "pentaksiran" dalam Akta tersebut, ia harus diselesaikan dengan memihak kepada pembayar cukai memandangkan statut pencukaian adalah bersifat penal.

[Rayuan ditolak dengan kos. Keputusan dan perintah yang dibuat oleh Mahkamah TInggi di Muar adalah disahkan.]

Cases referred to:
Government of Malaysia v. Preston Corpn. (M) Sdn. Bhd. [1982] CLJ (Rep) 453 ***(affirmed)***
ABC v. The Comptroller of Income Tax Singapore [1959] 25 MLJ 162 ***(dist)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. [1979] 1 MLJ 147 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 2, 91, 96A, 99(1), 113(1), (2)

Other source referred to:
Shorter Oxford Dictionary English, 3rd Edn.

For the appellant - Abdul Karim bin Abdul Jalil SFC; Attorney General's Chambers
For the respondents - K. Sila Dass; M/s. K. Sila Dass & Partners

JUDGMENT

Peh Swee Chin SCJ:

In *Government of Malaysia v. Preston Corpn. (M) Sdn. Bhd.* [1982] 1 MLJ 293, Wan Hamzah J (as he then was), held that a penalty imposed by the Director General of Inland Revenue under s. 113(2) of Income Tax Act 1967, was an assessment within the meaning of the word, and was therefore appealable to the Special Commissioners under s. 99(1).

Apparently, this did not find acceptance from all quarters so that the same issue was re-litigated in the instant appeal, when Tallala J in Muar High Court again came to the same conclusion upholding what Hamzah J (as he then was) decided. We feel it imperative to re-examine the same point in order to crystalize the position one way or another.

To recapitulate the salient facts, the respondents, (hereinafter called the taxpayers), using a heading entitled "Purchase of Logs" in their income tax returns, *inter alia*, apparently caused the Ketua Pengarah Hasil Dalam Negeri (hereinafter called the Revenue) to miss charging the taxpayers with timber profits tax. When the Revenue realized it they assessed and charged the timber profits tax which the taxpayers duly paid without protest apparently and there has been no appeal from this assessment.

The Revenue however subsequently and further imposed a penalty under s. 113(2) of the Income Tax Act 1967, (hereinafter called the Act) on the ground of the incorrect return or information, the penalty being in effect 100% of the timber profits tax collected earlier that is, the amount of tax undercharged. The taxpayers did not agree with this penalty.

Sections 113(1) and (2) of the Act are set out below for ease of reference and comparison:

Section 113 - Incorrect returns:

(1) Any person who:

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person

shall, unless he satisfies the Court that the incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return would have been undercharged if the return or information had been accepted as correct.

(2) Where a person:

(a) makes any incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives an incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person, then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under s. 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

Aggrieved by such imposition of such penalty, the taxpayers sent to the Revenue a letter dated 13 August 1984, together with a notice of appeal to the Special Commissioners with various grounds stated therein. The amount of timber profits tax was RM62,173.90 which was the amount also of the penalty and the latter was objected to.

The Revenue in reply asked for certain particulars and information to be furnished to the Revenue no later than 30 days from the date of their letter dated 20 August 1984, and stated that this was, to quote: “in order to expedite your outstanding appeal”.

The Revenue, at that stage, when referring to the outstanding appeal no doubt referred to the appeal by the taxpayers to the Special Commissioners.

Some 2 years and 8 months later, the Revenue wrote to the taxpayers and said the appeal had been rejected by themselves and the taxpayers were asked to pay up the penalty sum as soon as possible. It is safe to assume that the Revenue had shifted their ground by treating the taxpayers’ appeal to the Special Commissioners as apparently an application or appeal to themselves for review for relief thus precipitating the taxpayers’ motion in Court for an order of *certiorari* to quash the imposition of the penalty and for an order of *mandamus* directing the Revenue to refer the appeal to the Special Commissioners.

It would neither be essential nor even desirable to go into the merits or demerits in regard to the imposition of the penalty at this stage for reasons which will become apparent later. The question that was canvassed before us was cast in a pure question of law as to whether the said penalty imposed by s. 113(2) of the Act was appealable to the Special Commissioners.

Section 99 is first set out below:

Right of appeal

Section 99:

(1) A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under s. 92, within the first three months of the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under s. 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.

The right of appeal speaks of a person being aggrieved by an assessment of the Revenue. Therefore the question whether the imposition of the said penalty is an assessment assumes immediate importance.

The definition of assessment in s. 2 of the Act is then looked at. Assessment is simply defined as meaning "any assessment or additional assessment". It therefore does not assist anybody.

Resorting to *Shorter Oxford Dictionary*, 3rd Edn., "To Assess" means:

(1) to fix the amount of (taxation, fine, etc.) to be paid by a person or community

(2) to impose a fine or tax upon, to tax, fine.

Thus, for argument, by disregarding the provisions of the Act the definition in the dictionary tends to support the taxpayers. The dictionary, though not to be taken as an authoritative exponent of meanings of words used in statutes, is an important means of ascertaining the ordinary sense of words in accordance with literal construction of words - The primary rule.

The case of *ABC v. The Comptroller of Income Tax, Singapore* [1959] 25 MLJ 162 was cited for Revenue. In that case, Buttrose J mentioned in the course of judgment that assessment determined quantum of tax, involving a mathematical calculation and exercise of judgment. That case merely scratched the surface of the problem here as no question of imposition of penalty was involved there, but another totally different question of the validity of notices of assessment for lack of certain particulars on which the assessment was made.

The Court in *ABC* in the context of its own facts, appears to hold that assessment would be a matter of mathematical calculation of the quantum of tax, but one should not lose sight of the mention of the "exercise of judgment", which in its basic form must necessarily involve a consideration of relevant circumstances. It is hardly debatable that a penalty under s. 113(2) is normally imposed after such similar consideration.

It was argued to the effect, that on a comparison of ss. 113(1) and 113(2) of the Act, the Revenue, when imposing the penalty, need not be satisfied that the incorrect return or information was given in good faith whereas such good faith would preclude a conviction by the Court in respect of s. 113(1).

The learned Judge found from s. 113(2) a discretion vested in the Revenue, as to whether to impose or not, a penalty thereunder. His Lordship said:

> ... He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances ...

The Revenue seemed to have harked back to the discarded theme of unfettered discretion, and if they did, and we have little doubt that they did, it would be of salutary effect to remind ourselves of the inspiring words of Raja Azlan Shah Ag. CJ (as he then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 147 in which, while dealing with a claim for unfettered discretion, his Lordship said:

> I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (*ante*) and its progeny compel me to reject it and to uphold the decision of the learned Judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the Courts to intervene. The Courts are the only defence of the liberty of the subject against departmental aggression. In these days when Government Departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the Courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place.

Part VI of the Act begins with the heading of "Assessment AND Appeals" and Chapter (1) of such Part VI deals with "Assessment" and Chapter (2) with "Appeals". It was submitted for the Revenue to the effect that the word "assessment" in respect of which an appeal lay under s. 99 in Chapter (2) must be in the nature of assessment of tax and not of penalty as indicated by those sections in Chapter (1).

It is true that among the sections in Chapter (1), s. 91 refers to making "an assessment in respect of any tax-payers in the amount or additional amount of chargeable income and tax or in additional amount of tax ..." or words in similar vein in other sections. The word of penalty is conspicuously absent in the sections in Chapter (1) except s. 96A. These sections (other than s. 96A) in Chapter (1) do have the tendency to veer towards the exclusion of penalty (as opposed to tax) when speaking of assessment but s. 96A has somewhat opposite effect. Section 96A has the sub-heading of "composite assessment" and refers to incorrect return or information and to any agreement in writing which the Revenue and the taxpayer may come to in respect of undercharged tax payable plus the amount of any penalty also under s. 113(2). In such circumstances, the Revenue may make a composite assessment of tax and such penalty and serve a notice of such composite assessment. Section 96A provides that no appeal shall be against such a composite assessment.

Now, seemingly, the words, "composite assessment", refer to both tax and penalty, suggesting that but for the penalty, the assessment would have been stated simply as "assessment" without the adjective "composite". This tends to suggest that the penalty could be a matter of assessment or as a different or distinct component of assessment. The net result is, there is an ambiguity from the section in Chapter (1). It, however, ought to be resolved in favour of the taxpayer as a taxing statute is penal in nature. A composite assessment is not appealable

expressly under s. 96A, but nothing really turns on this for the rationale must be obvious, no one should be allowed to resile from an argument to which he is a party. The provision for non-appealability shares the same consequence of the non-appealability of a consent order made in Court.

The learned Judge in the Court below very rightly referred to Form J (which appears to be the prescribed form of notice of assessment of income tax) in which the penalty under s. 113(2) is to be added to the main body of income tax as part of the income tax payable within 30 days from the receipt of Form J. The contents or format of Form J does make it look likely that penalty is part of assessment appealable to the Special Commissioners.

It was submitted for the Revenue that unlike Malaysia, in Commonwealth countries there were express provisions for appeal against the imposition of such a penalty. This does tend to support the proposition that such penalty is not appealable, as after all the Act must have been modelled on Britain's Income Tax Act or that of some other Commonwealth country, Malaysia being a rather junior member of such countries so that omission by oversight would appear to be unlikely.

On an overview, however, we are more readily inclined to the view that a penalty imposed under s. 113(2), notwithstanding eg. the preceding para. is appealable to the Special Commissioners as an assessment referred to in s. 99 of the Act for reasons stated above, especially that there can be no unfettered discretion unless it is expressly enacted in the Act that such penalty under s. 113(2) of the Act is not appealable to the Special Commissioners of Income Tax.

We therefore confirm the decision of the High Court at Muar and the orders made there and dismiss the appeal with costs.

Also found at [1992] 4 CLJ 2079